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BEFORE THE
STATE OF CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

**In the Matter of the Notice and Order
Pertaining to:**

OAH No. 2008 100665

DIXON PIT LANDFILL

BOARD STAFF REPORT

**Guy Kalwani/ Super Pallet Recycling Corp.
Jasmall Singh/ Five Star Auto and Towing.**

**APPEAL OF DECISION BY THE OFFICE
OF ADMINISTRATIVE HEARINGS
REGARDING NOTICE AND ORDER
ISSUED SEPTEMBER 30, 2008 BY
SACRAMENTO COUNTY
ENVIRONMENTAL MANAGEMENT
DEPARTMENT AS THE LOCAL
ENFORCEMENT AGENCY**

Appellant(s).

_____ /

PUBLIC RESOURCES CODE § 45030

**Date: November 17, 2009
Time: 9:30 A.M.**

Board Staff, having considered : the Briefs of Appellant Super Pallet Recycling Corporation ("Super Pallet") and of Respondent Sacramento County, acting in its capacity as Local Enforcement Agency ("LEA"), both submitted on October 26, 2009; the pleadings filed in this matter; and the underlying record of the matter now pending; offers the following analysis of Super Pallet's assertions in this proceeding. In presenting its analysis, Board Staff first cites each of Appellant's bases for appeal on matters of law as contained in its Brief in turn. This is followed by citation to the Legal Conclusions reached by the Administrative Law Judge acting as Hearing Officer for the County herein (the "ALJ"), as stated in her Administrative Decision dated July 24, 2009. Finally, Board Staff then offers its analysis of Super Pallet's assertions and whether it concurs or differs, in whole or in part, with the ALJ's Decision.

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2 **1. First Legal Basis for Appeal (Issues 1, 8 and 9 in Notice of Appeal): The ALJ Erred**
3 **by Upholding an Order to Install Wells That Have Already been Installed**

4 **A. Summary of Parties' Assertions in Their Briefs**

5 Super Pallet asserts that the ALJ erred by finalizing the Order requiring the installation of
6 two new gas extraction wells.¹ Installation of the two wells in question, IGE-7 and IGE-8, was
7 complete by December 1, 2008, which Super Pallet believes rendered the issue moot prior to the
8 administrative hearing. The ALJ's analysis was focused on whether the Order was reasonable at
9 the time it was issued, not at the time of her decision.

10 The LEA counters that any question relating to the finalization of the Order is barred
11 because these issues were not raised during the administrative hearing and cannot properly be
12 raised for the first time in this appeal. Additionally, finalizing the Order gives effect to the other
13 requirements of the Order, particularly the requirement that Super Pallet comply with 27 CCR
14 20921. LEA also notes that in finalizing the Order, the ALJ acted in accordance with the
15 standards of PRC 45032(b)² which defines when an LEA's enforcement actions can be
16 overturned and was not required to consider the factors in PRC 45016 (though they offer a
17 lengthy argument that those factors were complied with as well).

18 **B. ALJ's Legal Conclusion and Discussion of Issue in Decision**

19 "Appellants installed the two new infill gas extraction wells, IGE-7 and IGE-8, that were part of the
20 approved plans for the facility, and were required to be completed pursuant to section 2 of the Notice and
21 Order, Specific Actions Required (page 5). Both wells were installed by December 1, 2008 (Finding 37)
22 [Issue 4]...The timetable for correction, as originally set forth in the Notice and Order, was reasonable and
23 appropriate. As a result of the filing of the appeal, the effect of any or all provisions of the Notice and
24 Order were stayed until the date of the completion of all administrative appeals. However, the fact that
25 appellants have taken some of the corrective actions specified in the Notice and Order does not make the
26 issuance of the Notice and Order 'moot.' Rather, it underscores the reasonableness of the Notice and Order
27 as originally issued." (Dec., p.22.)

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26 ¹ Exhibit F, Page 5, Requirement 2.

27 ² These are the standards CIWMB uses on appeal.

1 **C. Board Staff's Analysis of Issue**

2 Board Staff concurs with the legal conclusions of the ALJ as set forth in the above
3 portions of the underlying Decision, for the reasons stated therein. Super Pallet asserts in its
4 Brief that the "LEA persisted in seeking an order that the wells be installed, even though this has
5 already been accomplished." (App. Br., p.8) This might be a justifiable concern if this were a
6 proceeding wherein the LEA was persisting in seeking penalties or other relief for Super Pallet's
7 failure to comply with this provision of the Order (or if the wells had been installed prior to
8 issuance of the Order, for that matter), and we concur with Super Pallet that based on the
9 underlying record, the LEA appears to have no ground to seek further compliance with this
10 provision. However, this proceeding is limited to determining the validity of the Order and as
11 the ALJ noted, the obtainment of partial compliance during the pendency of the appeal does not
12 preclude the upholding of an Order deemed appropriate at the time of issuance. Nevertheless, to
13 assuage Super Pallet's concerns, through this Brief Board Staff requests that the LEA issue a
14 letter to Super Pallet acknowledging its compliance with this provision of the Order prior to the
15 hearing of this matter. If the LEA does not oblige, staff recommends that such a finding be
16 included in this Board's decision.

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19 **2. Second Legal Basis for Appeal (Issue 2 in Notice of Appeal): The Installation of Two
20 New Operational Extraction Wells complies With the N&O. The LEA Demand
21 [That] the Wells Be Operated When They Will Impede the Rest of the System Is
22 Unreasonable.**

23 **A. Summary of Parties' Assertions in Their Briefs**

24 Super Pallet believes that they have complied with Requirement 2 of the Order, which
25 requires them to install the two wells and "have both wells be operational." Super Pallet has
26 installed the wells, which they argue are operational, but they do not operate the wells. Super
27 Pallet's reasoning is twofold: first, because the Order does not require that the wells be actually
28 operating, they are technically in compliance; second, actual operation of the wells is implausible

1 because the wells do not produce adequate methane gas to burn and their operation would
2 actually prevent the entire LFG control system from working correctly. Because the wells do not
3 produce enough methane, their operation would cause the system's flare to go out due to the low
4 gas levels, which causes the entire system to fail. Super Pallet argues that it is unreasonable to
5 compel them to operate the wells when it would be detrimental to the effectiveness of the entire
6 system and that nothing in the Order requires them to redesign the flare to accommodate lower
7 levels of gas.

8 The LEA contends that these wells were proposed and designed by Super Pallet's
9 engineer and are now part of the landfill gas control plan. Super Pallet's engineer testified that
10 these wells would reduce the unacceptable methane levels at probe 10-2. The LEA argues that
11 they can and do require Super Pallet to comply with their landfill gas control plan and to keep the
12 methane levels within acceptable limits. Furthermore, they believe that a modification of Super
13 Pallet's flare system could allow the wells to operate with no detriment to the system, as testified
14 to by the Super Pallet's engineer. Finally, they dismiss the differentiation between "operational"
15 and "operating" as an "absurd semantic argument" and insist that "[i]nherent in the idea of
16 submitting a plan for wells is the expectation that one will use them."

17 18 **B. ALJ's Legal Conclusion and Discussion of Issue in Decision**

19
20 "The core issue on appeal is whether the installation of infill gas extraction wells IGE-7 and IGE-8 was
21 necessary in order to control methane gas concentration at probe 10-2 at or below the regulatory limit of 5
22 percent methane by volume in air.... The parties were permitted to introduce evidence of methane gas
23 readings at probe 10-2 after the corrections to the LFG collection system were completed on November 15,
24 2008, in order to give appellants every opportunity to show that the LFG control system, as corrected,
25 could control methane gas at the property boundary at or below the regulatory limit of 5 percent methane
26 by volume in air. However, methane readings at probe 10-2 continued to exceed the regulatory limit, as
27 recently as May 26, 2009. The fact that the flare was not operational on May 26, 2009, does not excuse
28 appellants' noncompliance with applicable regulations....[T]he methane concentration at the Dixon Pit
Landfill is insufficient to maintain the constant ignition of the flare. [Appellants' engineer] has been aware
of this situation since at least March of 2008, yet as of the last date of hearing, appellants have not taken
sufficient steps to remedy the situation.... [T]he addition of IFG-7 and IFG-8 will extract additional
methane from the landfill. Appellants must take all necessary steps (i.e., implement corrective measures to
the system) to insure that the methane gas concentration at probe 10-2 and all other perimeter probes is
continuously controlled at or below the regulatory limit of 5 percent methane by volume in air." (Dec., pp.
22-23.)

C. Board Staff's Analysis of Issue

Board Staff concurs with the legal conclusions of the ALJ as set forth in the above portions of the underlying Decision, for the reasons stated therein. As Super Pallet acknowledges in its Brief, "...the installation of the wells was originally proposed by [current owner] Five Star" (App. Br., p. 6), and thus the Order simply requires the responsible parties to comply with their own remediation proposal. Moreover, notwithstanding Super Pallet's attempts to control probe 10-2 through other measures than the operation of wells IGE-7 and IGE-8, they also concede that "[t]here are still occasional readings that exceed the 5% threshold..." (Id.) As noted by the ALJ, the addition of IFG-7 and IFG-8 will extract additional methane from the landfill and thus may bring probe 10-2 into compliance. While such operation may well impede flare performance, Super Pallet does not dispute that there are supplemental methods by which the flare could be kept lit (albeit some of which at additional cost) if the methane levels get too low. (See 6/9/09 Rptrs. Transcr., pp. 34-36.) Finally, if notwithstanding a good faith effort to remedy the situation through utilization of the new wells and the obtainment of supplemental fuel for the flare, compliance is still not obtained, at that point the efficacy of utilizing a flare at this facility may need to be re-examined and potentially replaced with an alternative mechanism, such as carbon filtration. However, the LEA is acting within its discretion in determining that the responsible parties should attempt to utilize the full potential of their present system before considering additional proposals.

3. Third Legal Basis for Appeal (Issue 3 in Notice of Appeal): The Decision of the ALJ Errs By Applying the Order to 29 of the 30 Probe Sets That Were Never at Issue

A. Summary of Parties' Assertions in Their Briefs

Super Pallet contends that because the Order was issued based on the methane levels at probe 10-2, the ALJ should have struck all references to any of the 29 other probes from the Order. Super Pallet cites no legal authority for this proposition.

1 LEA does not directly address this argument, other than with their general contention that
2 because this issue was not raised at the administrative hearing, it should not be considered on
3 appeal.

4 **B. ALJ's Legal Conclusion and Discussion of Issue in Decision**

5 The ALJ does not address this contention in her Decision, apparently because, as the
6 LEA posits, the matter was not raised as an issue on appeal. However, in reference to a separate
7 contention first raised by Super Pallet in its Closing Brief in the underlying proceeding, the ALJ
8 appropriately noted: "These matters were not previously raised as issues on appeal; they are
9 beyond the scope of these proceedings, and are not further addressed herein." (Dec., p. 24.)
10

11 **C. Board Staff's Analysis of Issue**

12 Board Staff concurs with the conclusion of the ALJ that matters not previously raised as
13 issues on appeal are beyond the scope of these proceedings, as the ALJ could not have erred in
14 not striking language where there was no request that such language be stricken. Thus this
15 matter need not be further addressed herein or by the Board in their Decision, except as noted.
16 The Board has no obligation to consider an appeal of legal and/or factual issues not raised to the
17 Hearing Officer.³
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19 **4. Fourth Legal Basis for Appeal (Issues 4-7 in Notice of Appeal): The Order That** 20 **"Any Other Corrective Measures" be Taken Before the Nature of Such Measures** 21 **Could be Determined lacks Basic Due Process Fairness.**

22 **A. Summary of Parties' Assertions in Their Briefs**

23 Super Pallet argues against the use of the terms "any other corrective measures" and
24

25 ³ In a judicial setting, a party is typically precluded "...from arguing for the first time on appeal questions that were
26 not presented to the trial court." County of Los Angeles v. Southern California Edison Company, 112 Cal. App. 4th
27 1108, 1118 (2004). See also, Ernst v. C.R. Searle, 218 Cal. 233 (1933) at 240-241: "The rule is well settled that the
28 theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and
adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but
manifestly unjust to the opposing litigant."

1 “[i]mmediately and continuously” in the Order. They believe it to be unreasonable to demand
2 they implement “any other corrective measures”⁴ within the timeframe given and that the term
3 itself is vague and overly broad, giving them inadequate guidance as to what is required for
4 compliance. They argue that the compliance date is the same for the installation of the new wells
5 and for the implementation of “any other corrective measures necessary to abate the gas violation
6 at probe 10-2” but that determination of other necessary measures, if any, would be impossible
7 until after the installation of the wells. They similarly argue that “[i]mmediately and
8 continuously” is inappropriate because it is not a “time schedule” nor does it allow them a
9 reasonable opportunity to comply as required by PRC § 45010. Finally, they also argue that the
10 immediacy requirement in Requirement 1 (to bring probe 10-2 into compliance) is contradictory
11 with the compliance date of November 17, 2008 for Requirements 2 and 2.1 (which are specific
12 acts to bring probe 10-2 into compliance).

13 The LEA argues that the language of the Order was appropriate. They contend that there
14 was adequate time given (6 weeks) for Super Pallet to implement “any other corrective
15 measures” and that it was appropriate to leave the particular corrective measures unspecified.
16 Because the regulations put the burden on the operator to design and operate the gas control
17 system, the operator has discretion to decide what corrective measures they will implement in
18 order to comply with the regulatory limits on gas migration. LEA also argues that immediate and
19 continuous compliance is an appropriate time schedule under PRC § 45011. Reasonableness is
20 not required under the statute and the immediacy is justified by the need to protect the public
21 health and safety.

22 **B. ALJ’s Legal Conclusion and Discussion of Issue in Decision**

23 With respect to the objection to the term “any other corrective measures” in the Order,
24 this was not addressed in the ALJ’s Decision, apparently because, as the LEA posits, the matter
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27 ⁴ Exhibit F, Page 5, Requirement 2.1.
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1 was not raised as an issue on appeal. This issue is similarly beyond the scope of these
2 proceedings and need not be further addressed herein or by the Board in their Decision, for the
3 reasons previously set forth.

4 With respect to the objection to the term “[i]mmediately and continuously” in the Order,
5 the ALJ ruled as follows”

6 “Appellants objected to the compliance date of ‘immediately and continuously’ for the requirement at
7 section 1 of the Notice and Order, Specific Actions Required (page 5), that ‘the methane gas concentration
8 at probe 10-2 and all other perimeter probes must be continuously controlled so as not to exceed the
9 regulatory limit of 5%.’ Appellants contend that a compliance date of ‘immediately and continuously’
10 does not constitute a ‘time schedule to which the facility or site shall be brought into compliance,’ within
11 the meaning of PRC section 45011. This contention is totally without merit. Appellants are required by
12 statute and regulation to maintain the landfill in such a manner that the methane gas concentration
13 migrating from the disposal site must not exceed 5 percent by volume of air.” (Dec., p. 23)

14 C. Board Staff’s Analysis of Issue

15 Board Staff concurs with the legal conclusions of the ALJ as set forth in the above portions
16 of the underlying Decision, for the reasons stated therein. Super Pallet asserts in its Brief that
17 “[a]ccording to the LEA, a landfill would be in violation of the emission limitation statutes the
18 **instant** a flare went out or a pump went down.” (App. Br., p. 13 (emph. in orig.)) This might
19 be a justifiable concern if this were a proceeding wherein the LEA was seeking penalties or other
20 relief for Super Pallet’s failure to comply with the Order by not “instantly” reactivating or
21 repairing an inoperable flare or a pump. While there is no evidence that the LEA would take such
22 a draconian stance (assuming Super Pallet was otherwise acting in good faith in operating the
23 system), the concern that an Order could be improperly interpreted to require an unreasonable
24 action does not in and of itself call into question the validity of the Order. Here a reasonable
25 interpretation of the Order was that penalties for noncompliance would not be pursued until after
26 the date set forth in the Order for installation of the additional wells and any subsequent needed
27 adjustments to mesh the wells with the existing system, as that was the mechanism to remedy the
28 gas exceedances proffered in the Order. Had the LEA not provided such an opportunity before

1 seeking penalties, a Court in such a case could overturn the fine as being inconsistent with a
2 reasonable interpretation of the Order.

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4 Dated: November 2, 2009

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7 Steven Levine
8 Senior Staff Counsel
9 California Integrated Waste Management Board
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